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16 DANIEL ZEIGER, Individually and on Behalf
of All Others Similarly Situated,

17 Plaintiff,

18 v.

19 WELLPET LLC, a Delaware corporation,

20 Defendant.

21 Case No. 3:17-cv-04056-WHO

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**WELLPET LLC'S OPPOSITION TO
PLAINTIFF'S MOTION FOR CLASS
CERTIFICATION**

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INTRODUCTION

2 This case is about dog food. Plaintiff claims that he and all putative class members got less
3 than they bargained for when they purchased certain Wellness® brand dog foods, because WellPet
4 represents the dog food as healthy, nutritious, and of high quality, while failing to warn consumers
5 that it contains “dangerous” and “unsafe” amounts of arsenic, lead, and the chemical bisphenol A
6 (“BPA”). Plaintiff contends this has caused consumers to pay more for the Wellness dog foods than
7 they otherwise would have paid. Plaintiff seeks to represent members of three putative classes and
8 brings claims for misrepresentation and omission, and breach of warranty. Courts have granted
9 motions to dismiss or for summary judgment and/or denied motions for class certification in several
10 substantially similar cases against other pet food manufacturers filed by this same plaintiff’s
11 counsel.¹ Plaintiff has not carried his burden to show that any of his claims should be certified either.

12 First, Plaintiff has not proven that common issues predominate as to any claims. The
13 challenged statements on the dog food have not appeared uniformly during the class period. Plaintiff
14 also has not shown that the statements have a uniform meaning to class members and are material
15 across the proposed class. Specifically, Plaintiff has not shown that the proposed class members
16 understand the phrases “uncompromising nutrition,” “with nothing in excess and everything in
17 balance,” “complete health,” “unrivaled quality standards,” and “natural” as representing that the
18 dog foods are completely free of trace elements that exist everywhere in the environment (none of
19 which were added by WellPet)—and which are found in nearly all pet food as well as in human
20 food.

21 Second, Plaintiff has not proven that damages are capable of measurement on a class-wide
22 basis. Plaintiff's damages model is based on a methodologically flawed consumer survey and
23 therefore fails to provide a relevant measure of the alleged impact on consumers of information
24 about the presence of arsenic, lead, and BPA. Most notably, the survey presents information about

²⁶ ¹ See, e.g., *Reitman v. Champion Petfoods USA, Inc.*, 2019 WL 7169792 (C.D. Cal. Oct. 30, 2019),
appeal docketed, No. 19-56467 (9th Cir. Dec. 19, 2019); *Renfro v. Champion Petfoods USA, Inc.*, 2020 WL 4433027 (D. Colo. July 31, 2020); *Simpson v. Champion Petfoods USA, Inc.*, 397 F. Supp. 3d 952 (E.D. Ky. 2019); *Weaver v. Champion Petfoods USA Inc.*, --- F. Supp. 3d ----, 2020 WL 3847248 (E.D. Wis. July 8, 2020), appeal docketed, No. 20-2235 (7th Cir. July 9, 2020); *Weaver v. Champion Petfoods USA Inc.*, 2019 WL 7370374 (E.D. Wis. Dec. 31, 2019); *Loeb v. Champion Petfoods USA Inc.*, 359 F. Supp. 3d 597 (E.D. Wis. 2019).

1 the risk of arsenic, lead, and BPA *only* for the Wellness products and not for other dog foods,
 2 resulting in unreliable and legally impermissible price premiums that *exceed* the price of the dog
 3 foods. This Court has held that “full refund” damages are improper in mislabeling cases.

4 Third, the named plaintiff’s claims are not typical. Plaintiff did not rely on the challenged
 5 statements when he first purchased the Wellness dog foods and he understands that arsenic, lead, and
 6 BPA exist everywhere. He doesn’t have a clear memory as to which of the more than 50 Wellness
 7 dry dog foods he bought (only three are at issue), and he couldn’t name the three products at issue in
 8 his complaint. Plaintiff also said he would rely on FDA to determine the appropriate levels of arsenic
 9 and lead in pet food, and believes it is reasonable for WellPet to rely on the levels of arsenic, lead,
 10 and BPA identified as safe by regulatory agencies.

11 Fourth, Plaintiff does not have standing to represent a class challenging the “natural”
 12 representation because he does not take issue with the use of that word on the Wellness packaging
 13 and doesn’t believe product claims of “natural.” Because Plaintiff does not have a claim personally,
 14 he cannot represent the proposed class as to this alleged misrepresentation.

15 Fifth, Plaintiff has not shown a Rule 23(b)(2) class should be certified. He is seeking
 16 predominantly money damages. Moreover, Plaintiff faces no real and immediate threat of repeat
 17 injury because he has no actual plans to purchase the Wellness products again, and he understands
 18 that arsenic, lead, and BPA are ubiquitous in the environment and therefore would not be misled in
 19 the future. Plaintiff also has an adequate remedy at law.

20 Finally, Plaintiff has not shown a Rule 23(c)(4) liability-only class should be certified. As
 21 with damages, the issue of liability is not subject to common proof. Plaintiff also has not shown that
 22 certification under Rule 23(c)(4) would materially advance the overall disposition of the case when
 23 numerous individualized issues would remain.

24 FACTS

25 • *The Wellness Products*

26 WellPet traces its roots back to 1873 as A. Hubbard & Son, a Gloucester, Massachusetts
 27 bakery that made hard tack sea biscuits. Declaration of Gregory Kean (Ex. A)² ¶ 7. In 1926, the Old

28 ² Unless otherwise noted, all exhibits are attached to the declaration of Joan R. Camagong.

1 Mother Hubbard Baking Company was born and began selling natural dog treats. *Id.* Old Mother
 2 Hubbard was purchased in 1961 by Jim Scott Sr., a professional in animal nutrition who was
 3 committed to developing highly nutritious products for animals. *Id.* In the 1990s, Jim Scott Jr. began
 4 working with animal nutrition experts, veterinarians, and scientists to develop pet food featuring the
 5 finest natural ingredients. *Id.* This effort resulted in the launch of Wellness® dry dog food in 1997.
 6 *Id.* ¶¶ 7-8. The Wellness brand includes among its product lines, Complete Health™ and CORE®.
 7 *Id.* ¶ 9. The Complete Health line includes more than 20 dry dog food varieties, while CORE is
 8 comprised of about 30 different dry kibble diets. *Id.* Complete Health and CORE together include 10
 9 fish-based diets. *Id.* The three products at issue are Complete Health Adult Whitefish & Sweet
 10 Potato (“Sweet Potato”), Complete Health Grain Free Adult Whitefish & Menhaden Fish Meal
 11 (“Menhaden”), and CORE Ocean (Whitefish, Herring Meal & Salmon Meal) (“CORE Ocean”). 2d
 12 Am. Compl. (“SAC”) ¶ 2. The products have been sold in various sizes from 4 lb. to 30 lb. bags.
 13 Declaration of Laura Marseglia (Ex. B) ¶ 4.

14 The Wellness packaging complies with the model pet food regulations established by the
 15 Association of American Feed Control Officials (“AAFCO”) and endorsed by FDA. Kean Decl. (Ex.
 16 A) ¶¶ 11-15. The packaging for the three products reflects the various characteristics of each diet.
 17 The front and back labeling explains each diet’s philosophy and highlights particular ingredients and
 18 benefits. *Id.* ¶ 16; Ex. C through Ex. J (Wellness dog food packages). The back of the packaging
 19 includes a list of all ingredients in descending order based on weight, and the AAFCO-required
 20 guaranteed analysis, which identifies the percentages of various nutrients (similar to the nutrition
 21 facts panel on human food). Kean Decl. (Ex. A) ¶ 15. Each package also contains “The Wellness
 22 Guarantee,” which informs consumers that if they are dissatisfied for any reason, they can return the
 23 unused portion for a full refund. *Id.* ¶ 17. The statements on the packaging have varied from product
 24 to product and over time in terms of content, location, and prominence. *Id.* ¶ 16. The statements
 25 Plaintiff challenges also have been accompanied by other statements that provide context.

26 • *Federal Regulation of Pet Food Safety*

27 FDA takes a risk-based approach to the identification of potential hazards in animal food. In
 28 2015, FDA issued regulations requiring animal food manufacturers to include hazard analysis and

1 risk-based preventive controls in their food safety programs. *See generally* 21 C.F.R. Part 507.
 2 Among other things, these regulations require manufacturers to identify and evaluate known or
 3 reasonably foreseeable hazards for each type of animal food manufactured. 21 C.F.R. § 507.33. Only
 4 if a substance is determined to constitute a hazard—and a hazard that requires a preventive control—
 5 does the manufacturer need to develop and implement a preventive control for the substance. *Id.*; 21
 6 C.F.R. § 507.34. In January 2018, FDA issued draft guidance for industry to help manufacturers
 7 identify and address known and reasonably foreseeable hazards for various types of animal food,
 8 including pet food. *Draft Guidance for Industry, Hazard Analysis and Risk-Based Preventive*
 9 *Controls for Food for Animals* (F.D.A. Jan. 2018) (Ex. K). FDA explains in this guidance that
 10 “[c]hemical substances in animal food are not always considered hazards and their occurrence may
 11 be unavoidable.” *Id.* at 48. Whether a substance is a “hazard,” depends on “[t]he particular chemical,
 12 and its level in the animal food[.]” *Id.* FDA advises consumers on its website that because arsenic
 13 and lead are so prevalent in the environment, “it is not possible to remove” them from the food
 14 supply.³

15 According to FDA, “[h]eavy metals are naturally occurring” and whether an animal develops
 16 an injury or illness from exposure to them “depends upon the species, level of the mineral in the
 17 animal food, and frequency of exposure.” *Id.* at 49-50. Because heavy metals are naturally-
 18 occurring, nearly all dog foods contain some amount of arsenic and lead. Report of Dr. Robert
 19 Poppenga (Ex. L) at 10. FDA expressly states that heavy metals are *not* hazards for kibble or the
 20 main ingredients in the Wellness products, including fish, grains, and fruit and vegetables. *Animal*
 21 *Food Draft Guidance* (Ex. K), at 142, 145, 153-54. This is consistent with the scientific literature
 22 and FDA’s prior analysis of pet foods (and, as discussed below, with WellPet’s own testing). *See*
 23 *generally* Poppenga Rep. (Ex. L) at 5-15.

24 In 2003, the National Research Council of the National Academics of Science (“NRC”)
 25 formed a committee of independent experts to conduct a thorough review of the scientific literature

26 ³ FDA, *Arsenic in Food and Dietary Supplements*, available at <https://www.fda.gov/food/metals-and-your-food/arsenic-food-and-dietary-supplements> (last visited Sept. 29, 2020); FDA, *Lead in*
 27 *Food, Foodwares, and Dietary Supplements*, available at <https://www.fda.gov/food/metals-and-your-food/lead-food-foodwares-and-dietary-supplements> (last visited Sept. 29, 2020).

1 and provide recommendations on the maximum tolerable dietary levels of heavy metals for animals.
 2 *Id.* at 10-11. Under the sponsorship of FDA's Center for Veterinary Medicine, the committee
 3 published *Mineral Tolerance of Animals* (2d ed. 2005), which identified maximum tolerable levels
 4 ("MTLs") for dozens of heavy metals and other substances. *Id.* at 11. The committee's findings are
 5 based on a wide variety of studies across multiple domestic species, including dogs and cats. *Id.* The
 6 committee determined that the MTLs were the appropriate limits for animal diets and physiology,
 7 not the human limits developed by the Environmental Protection Agency ("EPA") and the World
 8 Health Organization.⁴ *Id.*

9 As WellPet's expert says, these MTLs are "the best and most widely used scientific guidance
 10 available to veterinary toxicology and nutrition experts for determining what are safe levels of heavy
 11 metals in dog food." *Id.* at 12. Indeed, FDA also uses these MTLs when assessing the safety of
 12 animal food, along with information provided in AAFCO's *Official Publication*. See Poppenga Rep.
 13 (Ex. L) at 11-12 (discussing FDA's 2011 *Target Animal Safety Review Memorandum*) (Ex. M);
 14 *Center for Veterinary Medicine CY15-17 Report on Heavy Metals in Animal Food* (Oct. 24, 2019)
 15 (Pusillo Rep. (Mot., Ex. 9) app. A).

16 • *WellPet's Testing for Heavy Metals*

17 WellPet does not add arsenic or lead to its dog food products. Kean Decl. (Ex. A) ¶ 14.
 18 Because the company understood that it's possible for certain heavy metals, including arsenic and
 19 lead, to accumulate in fish, WellPet began conducting targeted tests of fish-based ingredients in 2013
 20 to determine whether the amounts of heavy metals would be concerning. *Id.* ¶ 36. WellPet conducted
 21 approximately 35 tests of its fish-based ingredients over a two-year period using a well-respected
 22 third-party laboratory. *Id.* The results showed that WellPet's fish-based ingredients did not contain
 23 arsenic or lead in amounts determined to present any health risk for dogs, based on the NRC's and

24 ⁴ Plaintiff's complaint cites the allowable limits for arsenic in food and drinking water for humans
 25 set by FDA and the EPA, although his experts do not reference them. SAC ¶¶ 4-5. Notably, the
 26 action limit FDA proposed for inorganic arsenic in infant rice cereal (and recently adopted), which
 27 Plaintiff approvingly cites in the complaint, *id.* ¶ 5, wouldn't be acceptable for dog food according to
 28 Plaintiff's expert, who claims that **no** level of arsenic is safe for pet food. Report of Dr. Gary
 Pusillo (Mot., Ex. 9) at 14-15. But as WellPet's expert explains, among numerous other missteps in
 Dr. Pusillo's report, he also fails to address the important distinction between organic and inorganic
 arsenic. Only *inorganic* arsenic poses a health risk to animals—the arsenic in fish-based ingredients
 is almost entirely *organic*. Poppenga Rep. (Ex. L) at 3, 13, 14-15.

1 FDA's MTLs. *Id.* ¶¶ 37-38; Poppenga Rep. (Ex. L) at 5. The test results on the Wellness products
 2 submitted by Plaintiff are also far below these limits—and even well below the more conservative
 3 regulatory limits of the European Union. Poppenga Rep. (Ex. L) at 5-6 (Table 1), 13-14 (Table 9).
 4 Moreover, as WellPet's expert explains, the amounts of arsenic and lead Plaintiff found in the
 5 Wellness products are comparable to those found in other premium dog foods. *Id.* at 9-10, Table 7.

6 These test results also align with FDA's 2018 draft guidance for animal food manufacturers,
 7 which indicates the ingredients are not a health risk. *See Animal Food Draft Guidance* (Ex. K), at
 8 142, 145, 153-54. Based on these test results, there has been no need for WellPet to establish any
 9 preventive controls for heavy metals.

10 As discussed in a separate *Daubert* motion, the opinion of Plaintiff's expert, Dr. Pusillo, that
 11 *no* level of arsenic or lead in pet food is safe for dogs is unreliable and inadmissible. His unscientific
 12 report largely relies on his subjective belief, unsupported assumptions, and quotes from irrelevant
 13 news reports that don't involve animals.⁵

14 • *BPA*

15 BPA is a chemical found in certain plastics and epoxy resins used in food and drink
 16 packaging, among many other things. Poppenga Rep. (Ex. L) at 16. WellPet does not intentionally
 17 add BPA to any products, nor is BPA used in the manufacture of WellPet's plastic storage containers
 18 and conveyor system buckets. Kean Decl. (Ex. A) ¶¶ 40-42. As with heavy metals, BPA is
 19 ubiquitous in the environment and humans and animals are exposed to it daily in many ways.
 20 Poppenga Rep. (Ex. L) at 16. It is present in our air, dust, and water. *Id.* In fact, a study of residential
 21 and office dust samples reported an average concentration of BPA of more than twice the amount
 22 found in the Wellness dog food. *Id.* Plaintiff's expert (Sean Callan) testified in a similar
 23 (unsuccessful) pet food case that quantifiable amounts of BPA were found in one-third of the several
 24 hundred dry kibble dog foods his lab tested.⁶ As WellPet's expert explains, BPA is also commonly

25
 26 ⁵ Although Plaintiff now argues in his class certification motion that no level of arsenic and lead is
 27 safe in pet food, Plaintiff's complaint alleges that the Wellness products contain "significant" and
 "alarming" levels of arsenic and lead. SAC ¶¶ 2, 12.

28 ⁶ *Reitman v. Champion Petfoods, USA, Inc.*, No. 2:18-cv-01736-DOC-JPR, Dkt. 190-16, at 54:10-15
 (C.D. Cal. Oct. 4, 2019).

1 found in human foods, particularly canned foods, and in amounts greater than those found in the
 2 Wellness dog foods. *Id.*

3 FDA has reviewed numerous scientific studies in recent years and continues to find that BPA
 4 is safe for use in the packaging of human food.⁷ Needless to say, FDA has not identified BPA as a
 5 potential hazard in pet food either. WellPet's expert explains that based on data from well-designed
 6 animal studies, the amount of BPA that would be consumed from eating the Wellness products—
 7 assuming the highest level of BPA found in Plaintiff's testing and WellPet's recommended feeding
 8 portions—is far less than one-tenth of one percent of the lowest known animal-derived no
 9 observable adverse effect level (NOAEL), and therefore well below any level that might cause harm
 10 to a dog. Poppenga Rep. (Ex. L) at 17-18. Plaintiff's experts point to no scientific evidence showing
 11 such trace amounts are harmful to dogs.

12 • *WellPet's Food Safety Procedures*

13 Despite FDA's conclusions that the trace amounts of arsenic, lead, and BPA found in the
 14 Wellness dog foods are safe, the lack of scientific evidence to the contrary, and FDA's risk-based
 15 approach to whether preventive controls are needed, Plaintiff still contends WellPet hasn't done
 16 enough. According to Plaintiff, WellPet should have done more testing and should have tested at the
 17 highly-sensitive detection level of parts per billion ("ppb"), rather than parts per million ("ppm")⁸,
 18 even though the maximum tolerable levels followed by FDA are in ppm (12.5 ppm for arsenic, 10
 19 ppm for lead), and Plaintiff's extra-sensitive ppb testing still showed arsenic and lead at just 12%
 20 and 3.1%, respectively, of these maximum tolerable levels.⁹ Poppenga Rep. (Ex. L) at 14. Plaintiff

21
 22 ⁷ FDA, *Bisphenol A (BPA)*, available at <https://www.fda.gov/food/food-additives-petitions/bisphenol-bpa> (last visited Sept. 29, 2020).

23 ⁸ A helpful illustration may be to think of one part per million as one second in a period of about two
 weeks, while one part per billion is one second out of roughly 32 years.

24 ⁹ Plaintiff argues that WellPet's corporate designee, Mr. Kean, admitted that the company would
 25 have considered arsenic and lead a risk if WellPet had tested at ppb instead of ppm, if results showed
 26 what was alleged in the complaint. Mot. at 5. That's not true. Mr. Kean misunderstood the question,
 27 which is evident from the reference in his answer to the FDA veterinary medical officer's review of
 28 a study on heavy metals in pet food. Kean Dep. (Ex. N) at 131:18-132:3; *see Target Animal Safety
 Review Memorandum* (Ex. M). The FDA review found that the levels of arsenic and lead in the pet
 foods were safe and well under the maximum tolerable levels identified by the NRC. Ex. M at 9-10,
 12. Mr. Kean's reference to this FDA review as the basis for his answer would have made no sense
 if he intended to say that WellPet considered the levels of arsenic and lead Plaintiff identified to be a
 health risk. The FDA review says just the opposite, and Mr. Kean intended to say just the opposite.

1 also claims that WellPet should have screened the dog food for BPA to prevent it from being
 2 present, even though BPA is found everywhere, including in the food we eat and other dog foods
 3 (Plaintiff's experts never explain how it could be eliminated entirely from the dog food), and FDA
 4 says it's safe.

5 Plaintiff further contends that WellPet's quality manual prohibited the presence of heavy
 6 metals and BPA in the pet food. But that's not what the manual says—or conveys. The manual states
 7 that heavy metals are not to be *introduced into WellPet's products* from direct or indirect contact,
 8 not that the products will be *free of heavy metals entirely*—which even FDA says is not possible.¹⁰
 9 Mot. at 4. Plaintiff also misreads the “Foreign Body Control” section of the manual. The manual
 10 references having procedures in place to remove foreign bodies from ingredients and finished
 11 product, including “wood, plastic, glass, stone, paper, cloth, human hair, insect parts, filth” and
 12 “metalized materials that are detectable by metal detectors and x-ray equipment.” WLPT00008059
 13 at 8087 (Mot., Ex. 5). As WellPet explains, however, this section of the manual is about removing
 14 solid objects from the food through magnets, sieves, and x-ray equipment; it has nothing to do with a
 15 chemical such as BPA that appears in microscopic amounts and which manufacturers could not
 16 remove anyway.¹¹ Kean Decl. (Ex. A) ¶ 44.

17 Plaintiff's reliance on the quality manual is misplaced in any event. This was a draft
 18 document that a member of WellPet's quality team created after Congress passed the Food Safety
 19 Modernization Act in 2011. *Id.* ¶ 24. The draft manual was prepared in anticipation of what FDA
 20 might subsequently require of manufacturers and was not intended to be a final document until after

21 Quite simply, he mistakenly said “yes” instead of “no.” Mr. Kean listened to the question and
 22 answer during a recess and subsequently corrected his answer. Kean Dep. (Ex. N) at 141:18-144:2.

10 See note 3, *supra*.

11 Plaintiff's animal nutrition expert claims that WellPet believed arsenic and lead could enter some
 23 of the fish ingredients during the manufacturing process. Pusillo Rep. (Mot., Ex. 9) at 19. Plaintiff's
 24 expert mischaracterizes WellPet's testimony, which did not pertain to arsenic and lead. The WellPet
 25 employee had explained that fragments of metal “could find their way into the product by -- just by
 26 means of wear and tear of the equipment that they need to pass through.” Deposition of Digvijay
 27 Gurung (Ex. S) at 149:4-150:6. Plaintiff's attorney later revisited this response, stating, “I think
 28 that's what you had testified before was that metal may enter some of the fish ingredients ... through
 the manufacturing process? The employee responded, “It could, yes. And that's why you also have
 screens and magnets as part of the [hazard analysis and critical control point] program, to make sure
 that they are removed if they are present.” *Id.* at 152:1-9. The employee was talking about removing
 metal fragments that can break off manufacturing equipment; he was *not* discussing arsenic and lead,
 which are present in microscopic amounts and could not be removed with screens and magnets.

1 FDA issued its follow-on regulations and industry guidance. *Id.* FDA issued regulations for animal
 2 food production in September 2015, followed by draft guidance on hazard analysis in 2018. *See* 21
 3 C.F.R. Part 507; *Animal Food Draft Guidance* (Ex. K), *supra*. The draft manual eventually was
 4 superseded by a food safety plan in late 2018. Kean Decl. (Ex. A) ¶ 24. As discussed above, FDA
 5 regulations and guidance incorporate a risk-based approach to food safety and the trace amounts of
 6 arsenic, lead, and BPA found in pet foods do not pose a health risk to dogs, precluding the need for
 7 preventive controls.

8 As WellPet argues in its *Daubert* motion, neither Dr. Pusillo nor Dr. Callan is qualified to
 9 render opinions on WellPet’s quality control procedures, as neither has expertise in food
 10 manufacturing or food safety. Moreover, their opinions are unsupported and therefore inadmissible.

11 • *The Class Representative*

12 Daniel Zeiger began purchasing Wellness dog food around 2010 after obtaining some free
 13 samples. Deposition of Daniel Zeiger (Ex. O) at 77:12-78:19, 134:15-135:6. Other than the name
 14 “Wellness” and the phrase “grain free,” he did not recall seeing any words on the packaging.¹² *Id.* at
 15 88:3-21, 99:3-22, 135:14-136:7. Zeiger considers himself a “very sophisticated” consumer and he
 16 understands that arsenic and lead are naturally occurring and that there are going to be trace levels of
 17 these elements in everything, including all pet food. *Id.* at 82:25-83:5, 120:18-121:7, 169:19-170:2,
 18 241:21-25, 253:7-12. Zeiger likewise understands that BPA is in most foods and that it is “all around
 19 us.” *Id.* at 142:4-9. He does not take issue with the use of “natural” on the Wellness packaging, and
 20 does not believe labels that claim a product is “natural.” *Id.* at 279:12-15, 258:11-21. Although his
 21 interrogatory answers state that he purchased CORE Ocean or Sweet Potato approximately every
 22 one to three months for approximately \$15.00 to \$18.99 per bag, Zeiger didn’t have a clear memory
 23 at his deposition as to which specific Wellness dog foods he bought and couldn’t name the products
 24 he is suing about.¹³ *Id.* at 17:19-25, 19:7-15, 276:2-12; Zeiger Interrog. Resp. No. 2 (Ex. T). He
 25 believes it is “reasonable” for manufacturers to rely on the levels of arsenic, lead, and BPA identified

26
 27 ¹² Through errata changes, Zeiger attempted to change his testimony to state that he relied on several
 28 of the challenged statements when he initially purchased Wellness dog food. WellPet moved to
 strike these changes as improper and the Court agreed. *See* Dkt. 138.

¹³ Zeiger’s deposition occurred just four months after his interrogatory answers were submitted.

1 as safe by governmental agencies, and he personally would rely on FDA. Zeiger Dep. (Ex. O) at
 2 148:16-149:2, 162:25-163:8, 213:23-24, 214:5-9. Zeiger also admitted his claims are “hypothetical,”
 3 and that to the best of his knowledge “[t]here’s no proof [these levels of arsenic, lead, and BPA] are
 4 “going to have any long-term effects.” *Id.* at 303:12-304:1. He does not allege that the Wellness dog
 5 foods harmed his dog.

LEGAL STANDARD

7 “The class action is an exception to the usual rule that litigation is conducted by and on
 8 behalf of the individual named parties only.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348
 9 (2011) (citation and internal quotation marks omitted). Before certifying a class, the court must
 10 conduct a “rigorous analysis” to determine whether a plaintiff has carried his burden to
 11 “affirmatively demonstrate” all certification requirements under Rule 23 have been met.¹⁴ *Comcast*
 12 *Corp. v. Behrend*, 569 U.S. 27, 33 (2013); *Dukes*, 564 U.S. at 350. Rule 23 is not a mere pleading
 13 standard; it requires a party seeking certification to offer evidence. *Comcast*, 569 U.S. at 33. The
 14 district court’s analysis will often overlap with the merits, but a court “must” consider the merits to
 15 the extent they do overlap. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011).
 16 Among other things, Plaintiff must offer a damages model to “establish that damages are susceptible
 17 of measurement across the entire class,” or else “[q]uestions of individual damage calculations will
 18 inevitably overwhelm” common questions. *Comcast*, 569 U.S. at 34-35; *Khasin v. R.C. Bigelow,*
 19 *Inc.*, 2016 WL 1213767, at *3 (N.D. Cal. Mar. 29, 2016).

ARGUMENT

21 Zeiger alleges misrepresentation and omission under the common law, CLRA, FAL, and
 22 UCL, and breach of express and implied warranty. He seeks certification of the following classes
 23 (see Mot. at i):

- 24 • *Wellness Class*: All persons in California who, from July 1, 2013, to the present,
 25 purchased Wellness Complete Health Adult Dry Whitefish and Sweet Potato dog food
 for household or business use, and not for resale;

27
 28¹⁴ As a procedural device, Rule 23 cannot alter a defendant’s substantive rights. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997).

- 1 • *Wellness Grain-Free Class*: All persons in California who, from July 1, 2013, to the
2 present, purchased Wellness Complete Health Adult Grain Free Whitefish and
3 Menhaden Fish Meal dog food for household or business use, and not for resale; and
4
- 3 • *Core Class*: All persons in California who, from July 1, 2013, to the present, purchased
4 Wellness CORE Adult Dry Ocean Whitefish, Herring Meal and Salmon Meal dog food
5 for household or business use, and not for resale.

5 Zeiger seeks to certify classes under Rule 23(b)(2) and Rule 23(b)(3), which requires him to satisfy
6 the requirements of Rule 23(a), Rule 23(b)(2), and Rule 23(b)(3).¹⁵ For the reasons detailed below,
7 Zeiger fails to carry his burden of proving he has met each of these requirements.

8 **I. Zeiger has not proven that common issues predominate as to any claims.**

9 A court can certify a Rule 23(b)(3) class only if it finds that “questions of law or fact
10 common to class members predominate over any questions affecting only individual members[.]”
11 Fed. R. Civ. P. 23(b)(3). The “predominance” requirement “tests whether proposed classes are
12 sufficiently cohesive to warrant adjudication by representation,” and it is “far more demanding” than
13 the commonality requirement of Rule 23(a). *Amchem*, 521 U.S. at 623-24. Zeiger has not satisfied
14 predominance because he has not shown he can demonstrate deception and causation using class-
15 wide proof, or that damages can be calculated on a class-wide basis.

16 **A. Zeiger has not shown he can demonstrate deception and causation using class -
17 wide proof.**

18 Zeiger’s causes of action require him to prove that the packaging of the Wellness products is
19 deceptive to reasonable consumers and that each proposed class member was injured as a result.
20 Zeiger cannot prove deception and causation on a class-wide basis because (1) the challenged
21 statements have not been uniform on the packages during the proposed class period; and (2) Zeiger
22 hasn’t shown that the challenged statements have a uniform meaning to consumers or are material
23 across the proposed class.

24 1. The challenged statements have not appeared uniformly on the products during
25 the proposed class period.

26 “[W]here exposure to the alleged misleading advertising and labeling varied, courts have
27 found that individual issues predominate because consumers’ understanding of the alleged

28 ¹⁵ Plaintiff alternatively seeks certification of a class under Rule 23(c)(4).

1 misrepresentation would not be uniform.” *Pierce-Nunes v. Toshiba Am. Info. Sys., Inc.*, 2016 WL
 2 5920345, at *7 (C.D. Cal. June 23, 2016); *see Kosta v. Del Monte Foods, Inc.*, 308 F.R.D. 217, 229
 3 (N.D. Cal. 2015) (denying class certification because challenged labels and packaging varied during
 4 class period); *see also Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012) (“A
 5 presumption of reliance does not arise when class members were exposed to quite disparate
 6 information”) (citation and internal quotation marks omitted). Here, the five challenged statements
 7 don’t all appear on all of the packaging. Some of the statements were added to the packaging later in
 8 the class period, some were removed or moved to other locations on the packaging, and some are not
 9 prominently displayed and therefore do not warrant an inference of class-wide exposure. *See Hadley*
 10 *v. Kellogg Sales Co.*, 324 F. Supp. 3d 1084, 1099-1100 (N.D. Cal. 2018) (finding that certain
 11 packaging statements displayed less prominently, such as on the back panel, would lead to
 12 individualized inquiries to determine which proposed class members actually saw them). Moreover,
 13 the challenged statements are accompanied by other explanatory statements, thus providing “context
 14 that differs from bag to bag.” *Reitman v. Champion Petfoods USA, Inc.*, 2019 WL 7169792, at *9
 15 (C.D. Cal. Oct. 30, 2019) (denying class certification in substantially similar dog food case); *see Ex.*
 16 C through Ex. J (Wellness dog food packaging).

17 There have been several materially different versions of the CORE Ocean packaging during
 18 the class period. The phrase “uncompromising nutrition” appeared only on the back of the packaging
 19 from mid-to-late 2013 until the spring of 2016.¹⁶ During this time, there were two different versions
 20 in the market. From mid-to-late 2013 until mid-to-late 2014, and from mid-to-late 2014 until the
 21 spring of 2016, the phrase appeared in differing print sizes and was accompanied by different
 22 statements that provided context. Exs. C, D, and E. Around the spring of 2016, the phrase was
 23 removed from the back of the packaging and placed in small print inside a small round “Wellness
 24 Way” seal on the bottom front of the packaging, adjacent to still other statements. Ex. F. Although
 25 consumers might have seen the seal itself, it’s far less clear that they would have read the statements

26 ¹⁶ “Uncompromising nutrition” may also have appeared on the side of some packages for a few
 27 months in mid-2013. *See Ex. C.* Each version of the packaging takes about three to six months from
 28 the time the packaging change is approved until it begins arriving on store shelves. Marseglia Decl.
 (Ex. B) ¶ 10. The date of each packaging change is the revision date located adjacent to the bar code
 on the back of each package. *Id.* ¶ 6. Accordingly, these time frames are approximate.

1 in small print inside it on the perimeter of the circle. “With nothing in excess and everything in
 2 balance” was on the packaging only from mid-to-late 2013 until the spring of 2016. It appeared only
 3 on the back of the packaging, immediately below a large graphic containing explanatory statements.
 4 Exs. D, E. “Unrivaled quality standards” has been on the packaging only since the spring of 2016, in
 5 small print inside the circular “Wellness Way” seal. Ex. F. “Complete health” doesn’t appear on any
 6 CORE Ocean packages.

7 The Sweet Potato product also has had three materially different versions in the market
 8 during the class period. From mid-to-late 2013 until the spring of 2016, “uncompromising nutrition”
 9 was on the back of the packaging, immediately followed by different statements that explain its
 10 meaning. Exs. G, H. Around the spring of 2016, the print size was reduced and the phrase was
 11 moved inside the “Wellness Way” seal on the front and back of the packaging, where it appears next
 12 to still other statements providing context. Ex. I; *see Reitman*, 2019 WL 7169792, at *10 (“each
 13 package’s labeling provides additional context that will require individualized analysis across Class
 14 members that predominate over any common questions”). As with CORE Ocean, the phrase
 15 “unrivaled quality standards” did not appear on Sweet Potato until 2016, when it was placed inside
 16 the small “Wellness Way” seal. Ex. I. From mid-to-late 2014 until the spring of 2016, the packaging
 17 contained a different seal—the “All Ways Well” seal—that had virtually the same design as the
 18 “Wellness Way” seal but contained different language. Ex. H. The phrase “with nothing in excess
 19 and everything in balance” hasn’t appeared on any of the Sweet Potato packaging.

20 On the Menhaden packaging, the phrases “uncompromising nutrition” and “unrivaled quality
 21 standards” also appear in smaller print inside the small round “Wellness Way” seal. Ex. J. The
 22 phrase “with nothing in excess and everything in balance” does not appear.

23 Because of the lack of uniformity in the labeling for the three products across the class
 24 period, Zeiger cannot show that class members were exposed to the same misrepresentations. *See*
 25 *Mazza*, 666 F.3d at 596; *Philips v. Ford Motor Co.*, 2016 WL 7428810, at *15-16 (N.D. Cal.
 26 Dec. 22, 2016), *aff’d*, 726 F. App’x 608 (9th Cir. 2018) (denying certification because “class
 27 members were not exposed to uniform representations” and therefore “reliance is a matter that would

28

1 vary from consumer to consumer").¹⁷ Zeiger has not proposed subclasses for each product based on
 2 the different versions of the packaging (and his damages model doesn't take the packaging changes
 3 into account). But the creation of subclasses would not be workable anyway. As noted, it takes on
 4 average anywhere from three to six months from the time WellPet approves packaging changes until
 5 the new packages begin arriving in stores. Marseglia Decl. (Ex. B) ¶ 10. This means there would
 6 have been a period of up to several months for each packaging change when the old and new
 7 versions of the same product's packaging appeared on store shelves at the same time. *Id.* ¶ 11. As a
 8 result, there are significant portions of the class period for which it would be difficult to determine
 9 the particular packaging versions class members purchased. *See Kosta*, 308 F.R.D. at 229.

10 2. Zeiger has not proven that the challenged statements have a uniform meaning to
consumers or are material across the proposed class.

12 Zeiger has not shown that the proposed class uniformly understands the challenged
 13 statements as (in his view) representing that the Wellness products are completely free of trace
 14 amounts of elements that exist everywhere in the environment and are found in nearly all pet food as
 15 well as in human food. As a result, Zeiger has not demonstrated that these alleged
 16 "misrepresentations" are material as to all class members and the issue of reliance will "vary from
 17 consumer to consumer." *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1022-23 (9th Cir. 2011).

18 Zeiger has not shown that class members would reasonably read the phrases
 19 "uncompromising nutrition," "with nothing in excess and everything in balance," "complete health,"
 20 "unrivaled quality standards," and "natural" as representing that the products are completely free of
 21 microscopic amounts of certain heavy metals and BPA, which are present in virtually everything.
 22 And he cannot make this showing. As another federal district court held in dismissing substantially
 23 similar claims against Champion Petfoods, "Champion did not claim that its products were free from
 24 any heavy metals and any inference to the contrary reads too much into Champion's
 25 representations." *Simpson v. Champion Petfoods USA, Inc.*, 397 F. Supp. 3d 952, 972 (E.D. Ky.
 26

27 ¹⁷ As Judge Koh explains, the Ninth Circuit has held that class exposure to disparate information can
 28 defeat a presumption of reliance in cases involving "both misleading statements and omissions."
Philips, 2016 WL 7428810, at *15 (citing *Mazza*, 666 F.3d at 585 and *Stearns v. Ticketmaster Corp.*,
 655 F.3d 1013, 1020 (9th Cir. 2011)).

1 2019); *see Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1162 (9th Cir. 2012) (“A
 2 representation does not become false and deceptive merely because it will be unreasonably
 3 misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the
 4 representation is addressed.”) (citation and internal quotation marks omitted). Zeiger has not shown
 5 that even a majority of consumers would interpret the above phrases on the Wellness packages in
 6 this manner. This lack of a common understanding among the proposed class precludes certification.
 7 *See Pierce-Nunes*, 2016 WL 5920345, at *7 (no common understanding as to the meaning of “LED
 8 TV”); *In re 5-Hour Energy Mktg. and Sales Practices Litig.*, 2017 WL 2559615, at *8-9 (C.D. Cal.
 9 June 7, 2017) (no common understanding of the meaning of “energy”).

10 Moreover, the challenged statements often appear on the packaging next to other statements
 11 that provide context and alter meaning. For example, the phrase “uncompromising nutrition” has
 12 appeared next to a block of text on the CORE Ocean packaging explaining that the product is “based
 13 on the nutritional philosophy that dogs, given their primal ancestry, thrive on a diet mainly
 14 comprised of meat,” the product is “nutrient-dense,” and “packed with a high concentration of
 15 quality animal protein, without fillers or grains, along with a proprietary blend of botanicals and
 16 nutritional supplements.” Ex. D. On other packaging the same phrase has appeared adjacent to “no
 17 meat by-products, fillers or artificial preservatives,” “guaranteed levels of omega-3 fatty acids from
 18 whitefish & flaxseed,” “easily digestible carbohydrates,” and “fortified with vitamins and minerals.”
 19 Ex. I.

20 “Complete Health”™ is the name of the line of Wellness dog foods that includes Sweet
 21 Potato and Menhaden. The packaging for both products contains numerous statements explaining the
 22 health benefits of those diets, including, among many others, “nutritious, balanced blends of high-
 23 quality proteins, select fats and carbohydrates will provide the energy your pet needs,” “guaranteed
 24 levels of calcium, phosphorous and vitamin A help support healthy teeth and gums,” “antioxidant-
 25 rich fruits and vegetables and nutritional supplements such as vitamin E help support a healthy
 26 immune system,” and “a combination of healthy fiber, chicory root extract and probiotics help
 27 support healthy digestion.” *E.g.*, Exs. I, J. In short, the entire package describes what is meant by
 28 “complete health.” Similarly, the phrase “with nothing in excess and everything in balance”

1 appeared immediately below and linked to a large graphic with text describing the benefits of CORE
 2 Ocean, including, among others, “optimum fat & calorie levels,” “high protein, grain free,” “green
 3 vegetables,” and “fish & flax omega health.” Ex. C. Zeiger has not shown that consumers would
 4 read any of the above statements as representations that the products are free of trace environmental
 5 elements. Without a common understanding of the challenged statements among consumers,
 6 materiality is not susceptible to common proof.

7 Although Zeiger’s marketing expert surveyed nearly 500 individuals who purportedly bought
 8 Wellness dry dog food during the class period, he didn’t ask any of them how they interpreted the
 9 five challenged statements. *See In re Conagra Foods, Inc.*, 302 F.R.D. 537, 577 (C.D. Cal. 2014)
 10 (faulting plaintiff for providing “no survey evidence concerning the actual reaction of consumers to
 11 the ‘100% Natural’ label on Wesson Oils”). That’s rather telling. Instead, Zeiger submits the report
 12 of an advertising expert who purports to know how consumers *would* perceive the statements. But
 13 the expert’s opinions don’t help Zeiger. He opines that consumers would interpret the challenged
 14 statements as representing that the Wellness products are “healthy,” “natural,” “safe,” and
 15 “superior.” Report of Bruce G. Silverman (Mot., Ex. 3) ¶ 59. We don’t need an expert to tell us that.
 16 Rather, the question for purposes of class certification is whether Zeiger can establish through
 17 common proof that the mere presence of trace amounts of arsenic, lead, and BPA renders the
 18 challenged statements false or misleading to each class member. He cannot do so. Silverman opines
 19 that because of exposure to “media reports” on the “dangers” of arsenic, lead, and BPA, consumers
 20 would likely reject any dog food in which the elements were present—*in any amount. Id.* He
 21 provides no support for such a sweeping, categorical opinion. Silverman cites reports such as a 60
 22 *Minutes* story on the high levels of lead discovered in drinking water in Flint, Michigan; a *Consumer*
 23 *Reports* online report about levels of arsenic found in certain bottled water; internet articles about
 24 lead in dog toys; and similar internet articles about BPA. But he provides no evidence to suggest that
 25 all or even a majority of consumers of these Wellness products in California saw these reports, or
 26 that they would share his same view of the information if they had.

27 Moreover, Silverman ignores important information that is equally available to class
 28 members (and which Plaintiff’s counsel apparently neglected to tell him). For example, he fails to

1 mention basic scientific, regulatory, and marketplace realities that consumers would undoubtedly
 2 consider important to their purchase decisions, including:

- 3 • FDA has stated that it is not possible to remove arsenic or lead entirely from the
 4 environment or food supply;
- 5 • the levels of arsenic and lead found in the Wellness products are commonly found
 6 in other premium dog foods and are well within the limits FDA (and the EU) has
 7 identified as safe for consumption by dogs;
- 8 • BPA exists everywhere in the environment, even human food, and FDA considers
 9 it safe; and
- 9 • there are no scientific studies showing that these trace levels of arsenic, lead, or
 BPA are harmful to dogs.

10 Because consumers are exposed to a variety of information, including the above facts ignored by
 11 Silverman, there is no basis for Silverman's assumption that all or nearly all Wellness consumers
 12 would be unwilling (or less willing) to buy the Wellness products due to the presence of *any* amount
 13 of arsenic, lead, or BPA. *See In re MyFord Touch Consumer Litig.*, 2016 WL 6873453, at *2-3
 14 (N.D. Cal. Nov. 22, 2016) (Because the "information individual plaintiffs were exposed to will vary
 15 considerably amongst class members," a "class-wide determination of reliance [is] impossible")
 16 (decertifying claims); *see also Weaver v. Champion Petfoods USA Inc.*, 2020 WL 3847248, at *3
 17 (E.D. Wis. July 8, 2020) ("[M]inute amounts of heavy metals are omnipresent in the environment
 18 and in all pet foods. If the mere presence of heavy metals in pet foods made a manufacturer's
 19 statements of quality misleading, then [Wisconsin's deceptive trade practices statute] would
 20 effectively bar the sale of any pet foods packaged or marketed in a manner that touts their quality.
 21 This is nonsensical, of course, as every pet food is advertised in this way.").

22 Zeiger also has not shown that most class members would view the presence of trace
 23 amounts of BPA as violating a "natural" representation, when BPA is present in air, dust, and
 24 water—even breast milk,¹⁸ was not an ingredient added to the dog food during the manufacturing
 25 process, and the dog food complies with the definition of "natural" established by AAFCO, which
 26 publishes the model pet food regulations endorsed by FDA.¹⁹ Kean Decl. (Ex. A) ¶¶ 11-14. Indeed,

27 ¹⁸ Poppenga Rep. (Ex. L) at 16.

28 ¹⁹ *See Memorandum of Understanding between the United States Food and Drug Administration and the Association of American Feed Control Officials* (Ex. P).

1 if the presence of trace amounts of BPA is sufficient to preclude a product from being labeled
 2 “natural,” then no food product—even those intended for humans—could ever be labeled
 3 “natural.”²⁰

4 For all these reasons, Zeiger has not proven that all or even most members of the proposed
 5 class would be concerned about the presence of arsenic, lead, and BPA *in any amount*.²¹ Zeiger
 6 provides no consumer survey or other evidence to suggest there is a common belief across the class
 7 in this regard. Individual inquiries would be required to determine each proposed class member’s
 8 knowledge and understanding of relevant facts, such as those above, and their corresponding beliefs
 9 about the significance of these trace amounts in dog food. *See Mazza*, 666 F.3d at 596 (“A
 10 presumption of reliance does not arise when class members were exposed to quite disparate
 11 information”) (citation and internal quotation marks omitted); *Philips*, 2016 WL 7428810, at *15-16.
 12 Accordingly, Zeiger has not shown that the alleged misrepresentations and omissions are material to
 13 the proposed class.²²

14 **B. Zeiger has not proven that damages can be measured on a class-wide basis.**²³

15 Zeiger also fails to satisfy predominance under Rule 23(b)(3) because his damages model
 16 “falls far short of establishing that damages are capable of measurement on a classwide basis.”
 17 *Comcast*, 569 U.S. at 34. As a result, “[q]uestions of individual damage calculations will inevitably
 18 overwhelm questions common to the class.” *Id.* Zeiger contends that WellPet deceived him and the
 19 proposed class and, as a result, they paid too much for the Wellness products. He seeks money

20 Zeiger has not shown that any class can be certified based on the alleged presence of BPA for the
 21 additional reason that he has not demonstrated that BPA is present in all or nearly all of the Wellness
 22 products purchased by class members. Zeiger’s expert found quantifiable amounts of BPA in only
 23 55% of the more than 100 WellPet products tested. Report of Sean P. Callan (Mot., Ex. 35) ¶ 3.
 24 Accordingly, common issues would not predominate regarding BPA. Nor can Plaintiff establish that
 25 BPA was present in any particular bag of dog food he purchased.

26 ²¹ Silverman’s views aren’t aligned with those of Zeiger, much less the entire proposed class. Zeiger
 27 believes there are trace levels of arsenic, lead, and BPA in everything. Zeiger Dep. (Ex. O) at 82:25-
 28 83:5, 120:18-121:7, 142:4-9, 253:7-12. He also thinks it’s “reasonable” for pet food manufacturers
 29 to rely on the levels of arsenic, lead, and BPA regulatory agencies identify as safe. *Id.* at 148:16-
 30 149:2.

31 ²² The same analysis applies not just to Zeiger’s misrepresentation claims, but also to his omission
 32 claims. Whether the absence of a warning about the presence of arsenic, lead, and BPA is deceptive
 33 requires the same individual inquiries into class members’ perceptions.

34 ²³ WellPet has moved to exclude Plaintiff’s economic and survey experts in a separate *Daubert*
 35 motion for the reasons set forth in this section.

1 damages. The model offered to support Zeiger's damages case "must be consistent with [his]
 2 liability case[.]" *Id.* at 35. Zeiger puts forth two closely related theories of liability: (1) the five
 3 challenged statements have misled consumers and caused them to believe that the Wellness products
 4 are free of trace amounts of arsenic, lead, and BPA; and (2) the Wellness products' packaging fails
 5 to warn consumers that the products contain arsenic, lead, and/or BPA. To satisfy *Comcast*, Zeiger
 6 "must be able to isolate the price premium associated with misleading consumers in that particular
 7 fashion." *In re Conagra*, 302 F.R.D. at 579. Zeiger's proposed damages model fails this test.

8 The damages model is fatally flawed in numerous ways, beginning with the marketing survey
 9 on which it is based. Zeiger's survey expert claims to have designed and conducted a market
 10 research survey that identifies "the difference in market value of the Wellness Food with the
 11 omissions and misrepresentations compared to the value of the Wellness Food without the omissions
 12 and misrepresentations." Report of Steven P. Gaskin (Mot., Ex. 4) ¶ 12. But the survey suffers from
 13 numerous design flaws and therefore does not provide relevant or reliable information.

14 1. The survey doesn't provide a relevant or reliable measure of the alleged harm.

15 First and foremost, the survey fails to provide a relevant or reliable measure of the purported
 16 impact on consumers of information about the presence of arsenic, lead, and BPA. The labeling
 17 statements shown to survey respondents include two hypothetical warnings proposed by Plaintiff's
 18 counsel: "May contain measurable amounts of heavy metals such as arsenic or lead" and "May
 19 contain measurable amounts of bisphenol A (BPA)." These statements irreparably bias the survey
 20 because they are leading and also *misleading*. Arsenic, lead, and BPA are commonly found in dog
 21 foods (and even human food). Poppenga Rep. (Ex. L) at 6-10, 16-18. But the survey presents
 22 information about the risk of presence of arsenic, lead, and BPA *only* for the Wellness products and
 23 not for other dog foods. If such disclosures were to be required, they would be made for *all* products
 24 in the market, not just Wellness. *See Zakaria v. Gerber Prods. Co.*, 755 F. App'x 623, 624 (9th Cir.
 25 2018) ("conjoint analysis [must] reflect market realities").

26 The survey is designed in a manner that results in bias. Plaintiff's "warnings" fail to include
 27 any context for the negative information they provide, such as the levels at which "measurable
 28 amounts" of arsenic, lead, and BPA would be harmful, the levels that occur naturally in the

1 environment, the levels present in other dog foods, the nutritional value of the ingredients in other
 2 dog foods, or information about the sourcing of ingredients by WellPet and other dog food
 3 manufacturers. As a result, the hypothetical warnings do not reflect the “real world” marketplace and
 4 cannot be used to estimate or predict actual purchasing behavior or consumer preferences. Because
 5 consumers know they haven’t seen these warnings on other dog foods—or even on any human
 6 foods—they would naturally be alarmed and assume, incorrectly, that this is an issue unique to
 7 Wellness dog food. Before any survey could purport to measure the true value consumers place on
 8 the labeling statements, it would, at a minimum, have to provide context, including informing
 9 consumers that these elements are present in nearly all dog foods, that FDA has stated these
 10 elements cannot be removed entirely from food, and that FDA finds these levels safe.

11 2. The survey unreliably and impermissibly results in price premiums that exceed
 12 the purchase price.

13 The proof that omitting this context created bias is evident from the survey results. The price
 14 premiums Gaskin calculates for the challenged statements and omissions *exceed 100% of the*
 15 *purchase price.* Report of Colin B. Weir (Mot., Ex. 31) ¶ 54. In other words, because the
 16 hypothetical warnings provided no context for consumers, the responses across all the challenged
 17 statements and omissions unsurprisingly (and unreliably) resulted in a *negative* value, i.e., less than
 18 \$0, for the Wellness products. But as the Ninth Circuit has held, “a plaintiff cannot be awarded a full
 19 refund unless the product she purchased was worthless.” *Brazil v. Dole Packaged Foods, LLC*, 660
 20 F. App’x 531, 534 (9th Cir. 2016). This Court and others in this district have rejected the “full
 21 refund” approach to restitution because it implausibly assumes the products provide no benefit. *See*
 22 *Khasin*, 2016 WL 1213767, at *3 (“Attributing a value of \$0 to the Green Tea Products assumes that
 23 *consumers gain no benefit in the form of enjoyment, nutrition, caffeine intake, or hydration from*
 24 *consuming the teas. This is too implausible to accept.”); *Werdebaugh v. Blue Diamond Growers*,*

 25 2014 WL 2191901, at *22 (N.D. Cal. May 23, 2014) (rejecting full refund model “because it is
 26 based on the assumption that consumers receive no benefit whatsoever from purchasing the accused
 27 products [when] [t]his cannot be the case, as consumers received benefits in the form of calories,
 28 nutrition, vitamins, and minerals”). As this Court held in *Khasin*, “the proper measure of restitution

1 in a product mislabeling case is not the full purchase price or all profits.” 2016 WL 1213767, at *3
 2 (internal quotation marks omitted). Zeiger *himself* testified that the Wellness products are fresher,
 3 provide more health benefits, and have better ingredients than other dog food. Zeiger Dep. (Ex. O) at
 4 95:17-96:12. A flawed damages model that would give full refunds (and more) to class members
 5 must be rejected.

6 3. The survey’s presentation of the challenged statements and product prices does
not reflect the “real-world” marketplace.

7 The survey is methodologically flawed in other ways. It presented the five challenged
 8 statements as stand-alone phrases in a list, without the surrounding text and graphics that appear on
 9 the packaging and provide meaning to the statements. Gaskin Rep. (Mot., Ex. 4) at 8 (Fig. 1). As a
 10 result, the respondents were left to subjectively interpret the statements without any context. By not
 11 using images of the actual packaging, the survey also improperly attributed equal weight to each
 12 statement, without regard to where and how the statement actually appears on the packaging (e.g.,
 13 front or back, large or small print, etc.). This methodology cannot reliably assess the actual value of
 14 the statements to consumers.

15 Similarly, the questions in the survey each included only five to seven attributes of the
 16 products (with very short descriptions) even though Gaskin identified 15 attributes while omitting
 17 still others that are included on the actual packaging. *Id.* at 8 (Fig. 1), 22-23; Ex. C through Ex. J. By
 18 limiting each hypothetical product profile to less than half of the actual attributes on the packages,
 19 the survey “artificially focused [respondents] on … particular feature[s].” *Oracle America, Inc. v.*
 20 *Google, Inc.*, 2012 WL 850705, at *10 (N.D. Cal. Mar. 13, 2012). As the court in *Oracle America*
 21 found, it is “highly likely” that respondents would place greater importance on an attribute if it were
 22 shown among only a few others as opposed to 15 or 20 other attributes. *Id.* (finding that artificially
 23 using a low number of features “warp[ed] what would have been [respondents’] real-world
 24 considerations”).²⁴

25
 26
 27 24 As Judge Alsup held in *Oracle America*, telling respondents to hold all other features constant
 28 may “in theory” make it unnecessary to test every feature, but here, as in *Oracle America*, the
 survey’s “irrational results shows that study participants did not hold all other, non-tested features
 constant.” *Oracle America*, 2012 WL 850705, at *11.

1 In addition, the hypothetical warnings are the *only* two negative statements among all the
 2 label statements presented in the survey; the other statements all involve positive attributes of
 3 Wellness. By including two warnings among otherwise positive statements, Zeiger made no real
 4 attempt to disguise the purpose of the survey. This renders the survey susceptible to “demand
 5 artifacts,” with respondents providing what they perceive to be “correct” answers, rather than
 6 answers that represent their actual opinions. Similarly, the questions in the survey mix the
 7 hypothetical warnings in among the statements that actually appear on the package. The survey
 8 cannot reliably measure the value of each challenged statement when the omitted statements also
 9 appear on the same hypothetical label. Indeed, what are respondents to think when they see “natural”
 10 right next to “may contain measurable amounts of bisphenol A (BPA),” with no explanation?

11 The inclusion of the two warnings undoubtedly influenced how respondents viewed the
 12 challenged statements, precluding the survey from measuring the true value of those attributes to the
 13 consumers. For example, as WellPet’s economic expert found, the value respondents placed on the
 14 term “natural” ranged from negative 47 to positive 113, with a negative value assigned by 34 percent
 15 of the respondents. Report of Dr. Jesse David (Ex. Q) ¶ 49. Similarly, 17 percent of respondents
 16 placed a *positive* value on the warning regarding heavy metals. *Id.* ¶ 49 n.60. Dr. David notes that
 17 these “irrational” preferences suggest respondents were (a) confused by the apparently contradictory
 18 statements in the questions; (b) didn’t care about the challenged statements and omissions; or (c)
 19 paid little attention to the questions; or, alternatively, it suggests the responses reflect random error.
 20 *Id.* ¶ 50. Regardless of the reason, this further undermines the survey’s reliability. *MacDougall v.*
 21 *Am. Honda Motor Co.*, 2020 WL 5583534, at *8 (C.D. Cal. Sept. 11, 2020) (finding that
 22 “irrationality exhibited in individual survey responses evidence[d] a deeply flawed conjoint study
 23 that produced unreliable results”).

24 The survey also used unrealistically low prices for the products and did not inform
 25 respondents as to the specific quantity of food in each bag. Gaskin selected \$35.00, \$45.00, \$55.00,
 26 and \$65.00 for the four price options. Respondents were informed that the prices all applied to the
 27 “largest” size of each of the Wellness products (the only size respondents were permitted to choose).
 28 Gaskin contends that this price range “reflects the actual market prices that prevailed during the

1 Class Period.”²⁵ That’s not true. The largest size of CORE Ocean generally has been priced at either
 2 \$64.99 or \$74.99, with Sweet Potato at \$59.99 or \$57.99, and Menhaden at \$57.99.²⁶ Prices of
 3 \$35.00 and \$45.00 are well below actual market prices for the largest size. *Zakaria*, 755 F. App’x at
 4 624 (“conjoint analysis [must] reflect market realities and prices for [the] products”). And because
 5 respondents all had purchased Wellness dry kibble products previously and would therefore have
 6 been familiar with the actual prices, this disparity from the real-world market likely caused
 7 additional confusion. By using unrealistically low prices, Gaskin also artificially increased the
 8 purported price premiums.²⁷ David Rep. (Ex. Q) at ¶ 74 n.102; *see MacDougall*, 2020 WL 5583534,
 9 at *6 (“By untethering his survey price choices from real-world prices, [the expert’s] methodology
 10 sows doubt as to the reliability of his [willingness-to-pay] calculation.”) (rejecting damages model).

11 A related design flaw is that respondents were told that the largest size “rang[ed] from 22-30
 12 lbs.”²⁸ but they were not told for each set of options whether they were getting 22 lbs., 30 lbs., or
 13 some quantity in between. Consumers pay for a specific quantity of dog food, not a weight *range*.
 14 This additional ambiguity in the survey’s design introduced the possibility that respondents were
 15 agreeing to pay particular prices based on differing quantity assumptions. By not identifying the
 16 specific quantity, the survey allowed that some respondents would consider the bags as containing
 17 22 lbs. for purposes of their purchase decision, while others might assume they contained 30 lbs. or
 18 some other quantity. This is important because some consumers would be willing to pay a particular
 19 price for 22 lbs. of dog food, but would be willing to pay more if they thought they were receiving
 20 30 lbs, which is 36% more.

21 4. The damages model improperly reflects only consumers’ purported willingness to
pay without consideration of supply-side factors and other marketplace realities.

23 Another glaring error in Zeiger’s damages model is that it purports to calculate a price
 24 premium for the products based on willingness to pay without reflecting market realities. The Ninth

25 Gaskin Rep. (Mot., Ex. 4) ¶ 24.

26 Declaration of Clark Reinhard (Ex. R) at Ex. A. This reflects WellPet’s suggested retail price.
 27 Some retailers may sell the large size at a slightly lower price, but certainly not in the \$35.00 to
 \$45.00 range.

27 Of course, Gaskin could not determine the market price for a dog food that is free of arsenic, lead
 and BPA because Zeiger has not identified any such dog food.

28 Gaskin Rep. (Mot., Ex. 4) ¶ 48.

1 Circuit has stated that such damages models “must, however, reflect supply-side considerations and
 2 marketplace realities that would affect product pricing.” *Zakaria*, 755 F. App’x at 624 (affirming
 3 summary judgment for defendant and decertification of putative class). In *Zakaria*, the Court of
 4 Appeals found that the expert’s conjoint analysis “showed only how much consumers subjectively
 5 valued” the label statement, “not what had occurred to the actual market price” of the product “with
 6 or without the label [statement].” *Id.* at 624-25. The plaintiff’s expert failed to provide evidence that
 7 any consumers “actually paid” a higher price as a result of the label statement, and the defendant
 8 presented undisputed evidence that “it did not raise the price of [the product] because of [the label
 9 statement].” *Id.* at 625. The court held that “the subjective value consumers place on the [label
 10 statement] does not set the price for [the product].” *Id.*

11 Gaskin’s conjoint analysis here fails for the same reason. Despite interviewing nearly 500
 12 consumers who actually purchased Wellness products during the class period, Gaskin’s analysis
 13 doesn’t show that any consumers *actually paid* a higher price for the products because of the
 14 challenged statements/omissions. And WellPet has submitted undisputed evidence that the products’
 15 prices *did not change* as a result of the challenged statements being added to or removed from the
 16 packaging. Reinhard Decl. (Ex. R) ¶¶ 9-20 & Ex. A. Although Zeiger’s economic expert purports to
 17 address supply-side considerations, Weir Rep. (Mot., Ex. 31) at 8, he’s done nothing of the sort.
 18 Instead, he disregards basic economic theory and makes irrelevant points about the historical number
 19 of units sold while failing to provide any analysis of the “but-for” conduct of sellers in the real
 20 world. *See* David Rep. (Ex. Q) ¶¶ 54-57. All Weir did was multiply the price premiums from
 21 Gaskin’s (faulty) survey by the total estimated retail sales in California; he performed no
 22 marketplace analysis. The Court should reject the damages model for this additional reason.

23 **II. The named class representative’s claims are not typical of the class members’ claims.**

24 “The purpose of the typicality requirement is to assure that the interest of the named
 25 representative aligns with the interests of the class.” *Stearns*, 655 F.3d at 1019. The court should
 26 deny certification “where a putative class representative is subject to unique defenses which threaten
 27 to become the focus of the litigation.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir.
 28 1992); *Nguyen v. Nissan North Am., Inc.*, --- F. Supp. 3d ----, 2020 WL 5517261, at *9 (N.D. Cal.

1 Sept. 13, 2020). Zeiger's interests are not aligned with those of the proposed class and he is subject
 2 to unique defenses. Accordingly, typicality is not satisfied.

3 Zeiger's lack of reliance on the statements at issue and his knowledge that arsenic, lead, and
 4 BPA are ubiquitous in the environment, including food, raises serious questions regarding his ability
 5 to establish standing to pursue his claims. *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018,
 6 1022 (9th Cir. 2003) ("[I]f [the named plaintiff] has no ... claim, she cannot represent others who
 7 may have such a claim, and her bid to serve as a class representative must fail."). Zeiger did not start
 8 buying the Wellness products in reliance on any of the five challenged statements. *See Sandoval v.*
 9 *PharmaCare US, Inc.*, 730 F. App'x 417, 419 (9th Cir. 2018) (affirming summary judgment when
 10 plaintiff failed to show that "he viewed and relied on the website before his first purchase of" the
 11 product). Zeiger first bought Wellness around 2010 after he obtained free product samples. Zeiger
 12 Dep. (Ex. O) at 77:12-78:19, 134:15-135:6. He remembered that the product was named "Wellness"
 13 and that the package said "grain free," but did not recall seeing any other words on the packaging.
 14 *Id.* at 88:3-21, 99:3-22, 135:14-136:7. He starting buying the dog food because when he opened the
 15 package it had a fresh smell and his dogs seemed to like it. *Id.* at 134:15-135:6. Before switching to
 16 Wellness, Zeiger fed his dogs Nutro. Zeiger said Nutro had good ingredients but that Wellness went
 17 "the extra mile" and the food was "moist looking" and more "stay-fresh" than Nutro." *Id.* at 87:1-8,
 18 94:6-11, 95:17-25.

19 Zeiger considers himself a "very sophisticated" consumer. *Id.* at 241:21-25. He knows that
 20 arsenic and lead are naturally occurring and that there are going to be trace levels of these elements
 21 in everything, including all pet food. *Id.* at 82:25-83:5, 120:18-121:7, 169:19-170:2, 253:7-12.
 22 Similarly, Zeiger understands that BPA is in most foods and that it is "all around us." *Id.* at 142:4-9.
 23 He looks at the ingredients on dog food packaging "religiously," and does not have any issue with
 24 the use of "natural" on the Wellness packages. *Id.* at 145:1-6, 279:12-15. Nor does Zeiger believe it
 25 when products claim to be "natural." *Id.* at 258:11-21.

26 Zeiger doesn't have a clear memory of the specific Wellness products he bought (his
 27 interrogatory answers notwithstanding), nor does his recollection correspond to when some of the
 28 products were on the market. Asked which products he is complaining about, he responded, "The

1 dry dog food, the one that I purchased. ... I purchased multiple ones. There's the plain one, there's
 2 the whitefish, and the other fish. *I think I've purchased all three at one time or another[.]*" *Id.* at
 3 17:19-25. When asked again to name the products he was suing about, Zeiger stated, "I don't
 4 remember the exact names because it's, you know, multiple things. It's the ocean fish one ... The
 5 other one was plain Wellness brand. I think it's chicken flavored or something like that. The basic
 6 one. And there's two different fish flavored ones." *Id.* at 19:7-15. Zeiger is wrong. All three dog
 7 foods at issue are fish-based, but he recalls at most buying two fish-based products. Even then,
 8 Zeiger couldn't name the specific products he is suing about, which is particularly problematic
 9 considering there are more than 50 Wellness dry dog food formulas, 10 of which are fish-based
 10 (Kean Decl. (Ex. A) ¶ 9), and only *three* are at issue in this case. There is no "chicken-flavored" or
 11 "plain" Wellness dog food at issue. Asked specifically about Complete Health Grain Free Whitefish
 12 and Menhaden, Zeiger claimed that he purchased it around 2009 and the word "CORE" appeared on
 13 the top of the package. But the Menhaden product wasn't marketed until 2016 and it doesn't say
 14 "CORE" on the package. *Id.* at 266:17-267:3, 269:20-24, 270:16-20; Ex. J. When pressed further,
 15 Zeiger conceded he may not have purchased the Menhaden product at all. *Id.* at 276:2-12.

16 Beyond these trouble signs, Zeiger states it is "reasonable" for pet food manufacturers to rely
 17 on the levels of arsenic, lead, and BPA identified as safe by governmental agencies. *Id.* at 148:16-
 18 149:2. He further states that he would rely on FDA for the appropriate levels of arsenic and lead in
 19 pet food. *Id.* at 162:25-163:8; 213:23-24, 214:5-9. This puts him at odds with his own expert, Dr.
 20 Pusillo, who disagrees with FDA and asserts (albeit without scientific support) that **no** level of
 21 arsenic, lead, and BPA is safe for dogs. These divergent views on the central issue in this case
 22 further render Zeiger unfit to serve as the class representative. Zeiger also concedes that his claims
 23 are "hypothetical," and that "[t]here's no proof [these levels of arsenic, lead, and BPA] are "going to
 24 have any long-term effects." *Id.* at 303:12-304:1.

25 Further, Zeiger runs a pet sitting business and bought Wellness dog food monthly for that
 26 business from October 2014 until July 2017. *Id.* at 283:1-14. He occasionally charged his customers
 27 for the Wellness dog food but has no idea how often he charged them because he didn't track it. *Id.*
 28 at 284:19-285:8. Because Zeiger cannot determine the degree to which he was reimbursed (he

1 cannot recover reimbursed costs), it would be difficult to calculate Zeiger's damages for this
 2 additional reason. This further jeopardizes his individual claims.

3 For all these reasons, Zeiger is not typical of the putative class.

4 **III. Zeiger lacks standing to represent a class challenging the “natural” representation.**

5 Zeiger doesn't have standing to represent a class of consumers alleging that the “natural”
 6 representation on the Wellness packaging is false or misleading. Zeiger cannot represent the
 7 proposed class because he has no claim himself. *Lierboe*, 350 F.3d at 1022 (“[I]f [the named
 8 plaintiff] has no ... claim, she cannot represent others who may have such a claim[.]”); *Fenerjian v.*
 9 *Nongshim Co.*, 72 F. Supp. 3d 1058, 1082 (N.D. Cal. 2014) (“[A]t least one named plaintiff must
 10 have standing with respect to each claim the class representatives seek to bring”); *see Lee v. State of*
 11 *Oregon*, 107 F.3d 1382, 1390 (9th Cir. 1997) (“Standing is a jurisdictional element that must be
 12 satisfied prior to class certification.”). Zeiger did not recall seeing the word “natural” on the
 13 Wellness packages, but does not take issue with the use of the word in any event. Zeiger Dep. (Ex.
 14 O) at 88:3-21, 99:3-22, 135:14-136:7, 279:12-15. But even if he did, he doesn't believe product
 15 claims of “natural.” *Id.* at 258:11-21. If Zeiger doesn't believe the “natural” claims on products, then
 16 he cannot claim to have been deceived or misled by the phrase “natural food” on the Wellness
 17 packaging—particularly when he didn't see it before buying the dog food. Without a viable
 18 individual claim, he cannot represent the proposed class as to this alleged misrepresentation.

19 **IV. Zeiger has not shown a Rule 23(b)(2) class should be certified.**

20 The Court also should deny Zeiger's request to certify a class under Rule 23(b)(2). First,
 21 Zeiger has not satisfied all of the Rule 23(a) requirements. Second, a Rule 23(b)(2) class “is
 22 appropriate only where the primary relief sought is declaratory or injunctive.” *Ellis*, 657 F.3d at 986
 23 (citation omitted). Although Zeiger half-heartedly argues otherwise, the primary relief he seeks on
 24 behalf of the proposed class is money—more than \$13 million, in fact. And “although the monetary
 25 amount sought may be small per class member, in the aggregate [it] can hardly be said to be
 26 incidental to the injunctive relief sought.”²⁹ *Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523,

27
 28 ²⁹ Lest there be any doubt that the primary focus of this case is monetary, not injunctive or
 declaratory relief, Zeiger's request to certify a Rule 23(b)(2) class is just half a page long and
 appears on the last page of his brief.

1 541 (N.D. Cal. 2012). Rule 23(b)(2) “does not authorize class certification when each class member
 2 would be entitled to an individualized award of monetary damages.” *Dukes*, 564 U.S. at 360-61.

3 Third, Zeiger lacks standing to seek injunctive relief. “Unless the named plaintiffs are
 4 themselves entitled to seek injunctive relief, they may not represent a class seeking that relief.”
 5 *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1045 (9th Cir. 1999). To have standing, Zeiger must
 6 show that “he has suffered or is threatened with a concrete and particularized legal harm, coupled
 7 with a sufficient likelihood that he will again be wronged in a similar way.” *Bates v. United Parcel*
 8 *Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (citations and internal quotations omitted). He “must
 9 demonstrate ‘a real and immediate threat of repeated injury’ in the future.” *Chapman v. Pier 1*
 10 *Imports (U.S.) Inc.*, 631 F.3d 939, 946 (9th Cir. 2011) (quoting *O’Shea v. Littleton*, 414 U.S. 488,
 11 496 (1974)). The threat of future injury must be “actual and imminent, not conjectural or
 12 hypothetical.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). Zeiger doesn’t face a real
 13 and immediate threat of repeated injury. He testified only that he would be “open to” the idea of
 14 buying the Wellness products again if WellPet “fixed” the dog food, but that he “would not”
 15 purchase the products if just the allegedly misleading labels were changed. Zeiger Dep. (Ex. O) at
 16 113:9-114:17, 264:2-12. The mere possibility that Zeiger *might* buy Wellness dog food again
 17 someday is not enough. The “threatened injury must be *certainly impending* to constitute injury in
 18 fact, and ... allegations of possible future injury are not sufficient.” *Rahman v. Mott’s LLP*, 2018
 19 WL 4585024, at *2 (N.D. Cal. Sept. 25, 2018) (quoting *Clapper v. Amnesty Int’l USA*, 568 U.S. 398,
 20 409 (2013)) (emphasis added); *see also Lanovaz v. Twinings North America, Inc.*, 726 F. App’x 590,
 21 591 (9th Cir. 2018) (holding that plaintiff’s statement that she would “consider buying” the products
 22 in the future did not support a finding of actual or imminent injury); *Sciacca v. Apple, Inc.*, 362 F.
 23 Supp. 3d 787, 803 (N.D. Cal. 2019) (dismissing injunctive relief claim because plaintiff “only
 24 alleges possible future injury, not an injury that is “certainly impending”).

25 Zeiger also hasn’t shown a “sufficient likelihood that he will again be wronged in a similar
 26 way.” *Bates*, 511 F.3d at 985. The wrong Zeiger alleges is the sale of the Wellness products with
 27 misleading labels. Because he has testified that he will not purchase the products in the future (even
 28 if the labels are changed), “it is unlikely that [he] will “again be wronged in a similar way.” *Lanovaz*,

1 726 F. App'x at 591. Moreover, Zeiger understands that trace levels of arsenic, lead, and BPA exist
 2 most everywhere, including in food. Zeiger Dep. (Ex. O) at 82:25-83:5, 120:18-121:7, 253:7-12,
 3 142:4-9. Therefore, he would not be misled in the future.

4 Finally, Zeiger cannot pursue a claim for injunctive relief because he has an adequate remedy
 5 at law. *Philips*, 2016 WL 7428810, at *23-25 (denying certification of Rule 23(b)(2) class for this
 6 reason). Zeiger alleges that he and the proposed class have been damaged by paying a price premium
 7 for the Wellness products. As Judge Koh found in *Philips*, “not only do[es] Plaintiff[] have an
 8 adequate remedy at law, Plaintiff[] [is] seeking to certify a class *asserting* that adequate remedy at
 9 law.” *Id.* at *24. In affirming the dismissal of the injunctive relief claims in *Philips*, the Ninth Circuit
 10 held that “the district court correctly determined that [Plaintiffs] were required to plead the
 11 inadequacy of their legal remedies to state a claim for injunctive relief.” *Philips v. Ford Motor Co.*,
 12 726 F. App'x 608, 609 (9th Cir. 2018); *see also Copelan v. Infinity Ins. Co.*, 359 F. Supp. 3d 926,
 13 930 (C.D. Cal. 2019); *Rhynes v. Stryker Corp.*, 2011 WL 2149095, at *4 (N.D. Cal. May 31, 2011).
 14 Zeiger’s claim for injunctive relief fails as a matter of law.

15 **V. Zeiger has not shown a Rule 23(c)(4) class should be certified.**

16 Anticipating the challenge he faces under Rule 23(b)(3) and Rule 23(b)(2), Zeiger
 17 alternatively seeks certification on liability issues pursuant to Rule 23(c)(4). The Court should deny
 18 this request. Zeiger has not satisfied all the requirements of Rule 23(a). *Tasion Commc’ns, Inc. v.*
 19 *Ubiquiti Networks, Inc.*, 308 F.R.D. 630, 633 (N.D. Cal. 2015) (“[A] Rule 23(c)(4) issues class must
 20 still meet the requirements of Rule 23(a)”). Zeiger has failed to satisfy typicality. He hasn’t
 21 satisfied the requirements for Rule 23(c)(4) either. Certification under Rule 23(c)(4) “is ‘appropriate’
 22 only if it ‘materially advances the disposition of the litigation as a whole.’” *Rahman v. Mott’s LLP*,
 23 693 F. App'x 578, 579 (9th Cir. 2017) (quoting William B. Rubenstein, 2 *Newberg on Class Actions*
 24 § 4:90 (5th ed. 2012)). As set forth above, the issue of liability is not subject to common proof. The
 25 challenged statements have not appeared uniformly on the packaging, and Zeiger has not shown that
 26 class members would uniformly interpret the challenged statements as representing that the products
 27 are free of trace amounts of substances that exist everywhere in the environment, including other dog
 28 foods. *See Adkins v. Facebook, Inc.*, 424 F. Supp. 3d 686, 697 (N.D. Cal. 2019) (finding “issue

1 certification is not appropriate where the determination of liability itself requires an individualized
 2 inquiry”).

3 Zeiger also has not shown “why a bifurcated proceeding would be more efficient or
 4 desirable.” *Rahman v. Mott’s LLP*, 2014 WL 6815779, at *9 (N.D. Cal. Dec. 3, 2014), *aff’d*, 693 F.
 5 App’x 578 (9th Cir. 2017). As in *Rahman*, Zeiger is “vague as to whether he intends to later certify a
 6 damages class, allow class members to individually pursue damages, or has some other undisclosed
 7 plan for resolving this case.” *Id.* The *Rahman* court found none of these options “particularly
 8 desirable.” *Id.* If the plaintiff prevailed on liability, “certifying a second class on the issue of
 9 damages would in essence amount to prosecuting two trials when one would have done just as
 10 well.”³⁰ *Id.* And the court found that alternatively “allowing myriad individual damages claims to go
 11 forward hardly seems like a reasonable or efficient alternative, particularly in a case such as this
 12 where the average class member is likely to have suffered less than a hundred dollars in damages.”
 13 *Id.*; *see D.C. by and through Garter v. County of San Diego*, 783 F. App’x 766, 767-68 (9th Cir.
 14 2019) (district court correctly recognized plaintiff “failed to show that damages could be sufficiently
 15 calculated on a classwide basis following success in the liability phase”); *Davidson v. Apple, Inc.*,
 16 2018 WL 2325426, at *26 (N.D. Cal. May 8, 2018) (denying certification of Rule 23(c)(4) class for
 17 similar reasons); 1 *McLaughlin on Class Actions* § 4.43 (15th ed. 2018) (bifurcating liability “does
 18 not materially advance the overall disposition of the case because” the court still must resolve
 19 “plaintiff-specific matters such as fact of injury, causation … and extent of damage”). The
 20 individualized issues here involving liability and damages calculations preclude certification under
 21 Rule 23(c)(4).

22 **CONCLUSION**

23 For all the foregoing reasons, WellPet respectfully requests that the Court deny Plaintiff’s
 24 motion for class certification.

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 28 ³⁰ As shown above, Zeiger has not shown damages could be proven class-wide in any event. *See*
 section I.B, *supra*.

1 Dated: September 30, 2020

Respectfully submitted,

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